Supreme Court U.S.
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No. 02-392

IN THE

Supreme Court of the United States

EMIL NOTTI, *et al.*,

Petitioners,

v.

COOK INLET REGION, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the federal question that Plaintiffs' state law claims necessarily present – whether a recent amendment to the Alaska Native Claims Settlement Act authorizes Cook Inlet Region, Inc. to distribute cash payments to its elders – sufficiently "substantial" to justify the District Court's assertion of federal subject matter jurisdiction?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Plaintiffs/Petitioners are five individuals: Emil Notti, James Grotha, Glen Kerr, Sam Pedro, and Ella Ring. Each of the Plaintiffs is a shareholder in Cook Inlet Region, Inc.

The Defendant/Respondent is Cook Inlet Region, Inc. ("CIRI"), a Regional Native Corporation established pursuant to the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601 *et seq.*, and headquartered in Anchorage, Alaska.

Pursuant to Sup. Ct. R. 29.6, CIRI notes that it has no parent corporation, and that no publicly held company owns 10% or more of CIRI's stock.

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I. OPINIONS BELOW

CIRI agrees with Petitioners' description of the orders and opinions below, except that the Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court for the District of Alaska in an unpublished Memorandum, not in a published Opinion as Petitioners suggest in their Brief. *Cf.* Ninth Cir. R. 36-1 (distinguishing between Memoranda and Opinions).

II. JURISDICTION IN THIS COURT

CIRI agrees that Petitioners properly have invoked this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

III. STATUTES INVOLVED

CIRI submits that only three statutory provisions are "involved" in the question whether this Court should grant a writ of certiorari. *Cf.* Sup. Ct. R. 24(f). They are as follows:

(1) 28 U.S.C. § 1331 authorizes "federal question" or "arising under" jurisdiction:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(2) AS 10.06.960(f), a provision in the Alaska Corporations Code, prescribes the manner in which that state code applies to Alaska Native Corporations:

> Notwithstanding the other provisions of this chapter [*i.e.*, the Alaska Corporations Code], a corporation organized under [ANCSA] is governed by [ANCSA] to the extent [ANCSA] is inconsistent with this chapter, and the corporation may take any action . . . authorized by [ANCSA] . . . .

(3) ANCSA Land Bank Protection Act of 1998, Pub. L. No.

105-333, § 12, 112 Stat. 3129, 3135, *codified at* 43 U.S.C. § 1606(r), an amendment to ANCSA that the parties agree is inconsistent with certain provisions of the Alaska Corporations Code, and that CIRI contends (and the District Court and the Court of Appeals concluded) authorizes CIRI to distribute cash payments to its elders:

> Section 7 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1606) is amended by adding at the end the following:
>
> BENEFITS FOR SHAREHOLDERS OR IMMEDIATE FAMILIES. – The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.

IV. STATEMENT OF THE CASE

This case presents a one-of-a-kind jurisdictional question that turns on the unique interplay of a single provision of the Alaska Corporations Code and a single amendment to ANCSA. The jurisdictional question in this case has no broad import outside its singular set of facts and law. This case does not implicate any "circuit split," and Petitioners cannot cite a single decision that "conflicts" in any way with the decision of the Ninth Circuit in this case. Contrary to Petitioners' assertion, there is no decisional split concerning the circumstances in which Congress's creation of a private right of action to enforce a federal statute is a necessary predicate for federal subject matter jurisdiction over state law

claims incorporating such a federal law. Even if there were a circuit split, the Ninth Circuit's decision in this case would not bear on it given the unusual circumstances in this case. Further, the orders of the District Court and the Court of Appeals are unpublished.

The orders also are undoubtedly correct: Petitioners' "right to relief depends upon the construction or application of . . . the laws of the United States," *see Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921), and the federal question plaintiffs' claims present is "substantial." *See Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983).

Plaintiffs in this case challenge the legality of CIRI's "Elders Benefit Program," by which CIRI makes quarterly cash payments to its elders, on the principal ground that the benefits purportedly constitute a discriminatory dividend in violation of the Alaska Corporations Code.

CIRI established its program soon after Congress amended ANCSA to confirm expressly that Native Corporations may distribute benefits, such as the elders benefits at issue here, on a basis *other* than pro rata based on share ownership.

Congress saw fit to amend ANCSA in this way because a decision of the Supreme Court of Alaska, *Hanson v. Kake Tribal Corp.*, 939 P.2d 1320 (Alaska 1997), had cast doubt on the legality of Native Corporations' provision of such benefits to their shareholders and their families. The plaintiffs in *Hanson v. Kake* successfully challenged as a discriminatory dividend a Native Corporation's provision of insurance and

death benefits to shareholders.[1] In response, Congress enacted section 12 of the ANCSA Land Bank Protection Act of 1998, Pub. L. No. 105-333, 112 Stat. 3129, 3135, *codified at* 43 U.S.C. § 1606(r). As amended, ANCSA now provides:

> The authority of a Native Corporation to provide benefits to its shareholders who are Natives or descendants of Natives or to its shareholders' immediate family members who are Natives or descendants of Natives to promote the health, education, or welfare of such shareholders or family members is expressly authorized and confirmed. Eligibility for such benefits need not be based on share ownership in the Native Corporation and such benefits may be provided on a basis other than pro rata based on share ownership.

43 U.S.C. § 1606(r).

Senator Murkowski of Alaska made clear in debate that the purpose of the amendment was to "confirm[] the original intent of ANCSA in 1971: that ANCSA corporations could provide health, education and welfare benefits for Alaska Natives, including those persons who were their shareholders." 144 Cong. Rec. S12,589 (daily ed. Oct. 14, 1998) (statement of Sen. Murkowsi). Senator Murkowski

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[1] Counsel for Petitioners in this case also was counsel for plaintiffs in the *Hanson v. Kake* case, and has been counsel for plaintiffs in several other cases in which plaintiffs have alleged that Native Corporations have provided benefits to shareholders that constitute discriminatory dividends, or otherwise violate the law. *See Broad v. Sealaska Corp.*, 85 F.3d 422 (9th Cir. 1996) (affirming summary judgment for the Native Corporation); *Demmert v. Kootznoowoo, Inc.*, 960 P.2d 606 (Alaska 1998) (reversing summary judgment for Native Corporation on procedural grounds because court had not given adequate notice that it was converting a 12(b)(6) motion into a motion for summary judgment); *Sierra v. Goldbelt, Inc.*, 25 P.3d 697 (Alaska 2001) (affirming summary judgment for the Native Corporation).

noted that the *Hanson v. Kake* decision was "inconsistent with the intent behind ANCSA." 144 Cong. Rec. S12,589. The Senator specifically indicated that by its passage of section 7(r), Congress intended to authorize programs involving "elder benefits including cash payments." *Id.* He further stated that "these programs represent an important part of the ANCSA corporations." *Id.*

In May 2000, CIRI implemented its Elders Benefit Program – a revocable trust that provides quarterly payments of $450 to all living persons who received shares in CIRI as original enrollees and have reached the age of sixty-five. Notwithstanding Congress's express authorization of elders benefit programs such as CIRI's, Petitioners sued CIRI in Alaska state court in June 2000, alleging that CIRI's program violated various provisions of the Alaska Corporations Code, as well as Alaska common law.

The Alaska Corporations Code, however, has a unique feature. Although ANCSA provides that Regional Native Corporations such as CIRI are to be "established under the laws of the State of Alaska," *see* 43 U.S.C. § 1602(g), ANCSA itself plays a significant role in regulating the internal corporate affairs of these corporations. *See, e.g.*, 43 U.S.C. § 1606(e) (Secretary of Interior must approve Native Corporations' articles of incorporation and bylaws); 43 U.S.C. § 1606(h)(2)(C) (only Natives may own voting shares of stock). The Alaska Corporations Code accounts for this unusual system of simultaneous state and federal regulation of internal corporate affairs by providing expressly that, in the case of any inconsistency between the state code and ANCSA, ANCSA provides the applicable rule of conduct:

> Notwithstanding the other provisions of this chapter [*i.e.*, the Alaska Corporations Code], a corporation organized under [ANCSA] is governed by [ANCSA] to the extent [ANCSA] is inconsistent with this chapter, and the corporation may take any action ... authorized by [ANCSA]

. . . .

AS 10.06.960(f).

The effect of this provision is to incorporate into the Alaska Corporations Code any provision of ANCSA, including, in CIRI's view, 43 U.S.C. § 1606(r), that arguably is "inconsistent" with the code, or that authorizes any action by a Native Corporation. The result is that, whenever ANCSA is inconsistent with the Alaska Corporations Code, or authorizes a certain action, it is impossible to determine whether the Native Corporation has complied with state law without looking to ANCSA. Accordingly, Petitioners' allegation that CIRI violated the Alaska Corporations Code in implementing its Elders Benefit Program necessarily requires reference to ANCSA, and necessarily requires resolving the substantial federal question of whether ANCSA authorizes the program.

CIRI therefore removed the case to the U.S. District Court for the District of Alaska.

Petitioners moved to remand. Prior to the hearing on the motion to remand, the District Court issued a thirteen-page preliminary order, tentatively concluding that it had subject matter jurisdiction.[2] The District Court then conducted

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[2] The District Court's preliminary order also invited CIRI to bring an early dispositive motion if the Court concluded that it in fact did have jurisdiction. The District Court quoted 43 U.S.C. § 1606(r), and then noted:

> Applying the ANCSA provision quoted above in conjunction with state law would seem to lead one to the inevitable conclusion that it is entirely permissible for an ANCSA corporation to allot shareholder dividends on a preferential basis. This being the case, it is difficult to understand how CIRI would not be entitled to some form of dispositive relief upon motion. . . . For purposes of expediting both an appeal of the subject matter jurisdiction issues raised in Notti's motion and the ultimate disposition of the controversy, it may be most efficient for the parties to move for dispositive relief immediately if the court denies the motion to remand.

Pet. for Writ of Cert. App. A at 13a – 14a.

argument, and, subsequently, issued an order concluding that it did have subject matter jurisdiction. Its reasoning was straightforward. The District Court held that, by virtue of the provision in the Alaska Corporations Code that incorporates any provision of ANCSA that is inconsistent with the Code or that authorizes conduct by a Native Corporation,

> application of Alaska state law "turns on" construction of ANCSA, which is undeniably a federal law. . . . ANCSA is an integral part of the state provisions forming the basis of Notti's complaint. The substantive scope of state law is defined by reference to federal law. The federal question does not arise as a defense; instead, it defines the nature of state law. Under these circumstances – admittedly somewhat unique – federal law is a "necessary element" of the state claim. Federal question jurisdiction exists.

Pet. for Writ of Cert. App. B at 17a – 18a.

In February 2001, Petitioners sought leave to file an interlocutory appeal of the District Court's denial of the motion to remand, and CIRI filed a motion for summary judgment. Petitioners never opposed the motion for summary judgment. Instead, Petitioners filed a motion seeking to stay the case pending the District Court's decision on whether to grant leave to seek interlocutory review of the jurisdictional determination. On May 1, 2001, the District Court issued an order granting summary judgment, and denying as moot the motion for leave to seek interlocutory review and the motion to stay. On May 2, 2001, the District Court entered judgment for CIRI, and subsequently denied Petitioners' motion for reconsideration.

Petitioners then appealed to the U.S. Court of Appeals for the Ninth Circuit, challenging the District Court's assertion of jurisdiction, and its grant of summary judgment on the merits. Because CIRI had suspended Elders Benefit Program

payments on account of the pendency of the litigation, CIRI filed a motion to expedite the hearing on the appeal, which the Court of Appeals granted. The Court of Appeals heard argument on March 5, 2002, and issued an unpublished Memorandum on March 22, 2002, affirming the judgment of the District Court.

Petitioners then filed the instant Petition for Certiorari, challenging the Ninth Circuit's conclusion that the District Court had subject matter jurisdiction. CIRI initially waived its right to respond to the Petition, but this Court, on November 2, 2002, requested that CIRI file this response.

V. ARGUMENT

A. The Court Of Appeals Properly Applied Principles Of Law That Are Not In Dispute

The Court of Appeals analyzed the jurisdictional question in this case as follows:

> The district court had subject matter jurisdiction because the complaint raises a substantial federal question of whether Section 7(r) of ANCSA, 43 U.S.C. § 1606(r), authorizes CIRI to pay dividends to Native leaders who were original CIRI shareholders.

Pet. for Writ of Cert. App. D at 28a. This analysis is a correct application of settled law.

"The general rule is that where it appears from the bill or statement of the plaintiff that the right to relief depends upon the construction or application of the Constitution or laws of the United States, and that such federal claim is not merely colorable, and rests upon a reasonable foundation, the District Court has jurisdiction . . . ." *Smith*, 255 U.S. at 199. Therefore, "[e]ven though state law creates [the plaintiff's] causes of action, its case might still 'arise under' the laws of the United States if a well-pleaded complaint established that

its right to relief under state law requires resolution of a substantial question of federal law in dispute between the parties." *Franchise Tax*, 463 U.S. at 13. In other words, "a case may arise under federal law 'where the vindication of a right under state law necessarily turned on some construction of federal law.'" *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986) (quoting *Franchise Tax*, 463 U.S. at 9). Accordingly, in order to find federal subject matter jurisdiction under *Smith* and *Franchise Tax*, the federal question presented by the state law cause of action must be both "necessary" and "substantial."

Here, by virtue of the provision in the Alaska Corporations Code that incorporates those portions of ANCSA that are inconsistent with the code or that authorize specific acts, Peittioners' claims that arise under the Alaska Corporations Code necessarily require resolution of the federal question whether 43 U.S.C. § 1606(r) in fact authorizes CIRI's Elders Benefits Program.

Petitioners do not dispute that their state law claims *necessarily* require resolution of this question. *See, e.g.*, Pet. for Writ of Cert. at i ("The ultimate issue is whether the incorporation of a federal law by state law allows the removal under 28 U.S.C. § 1441 to federal court of a state corporate law claim . . . and the subsequent finding of federal jurisdiction under § 1331."); *cf. Rains v. Criterion Sys.*, 80 F.3d 339, 345-46 (9th Cir. 1996) (holding that removal was improper where determination of federal question was not "necessary" to determining whether plaintiff's termination

violated public policy).[3]

Rather, Petitioners argue that the particular federal question incorporated in their state law claims is not sufficiently "substantial" to trigger *Smith/Franchise Tax* jurisdiction. Specifically, Petitioners argue that the question whether 43 U.S.C. § 1606(r) authorizes the Elders Benefits Program is not a "jurisdiction-triggering federal question" because 43 U.S.C. § 1606(r) – which is the source of the federal question here – does not itself create a private right of action. Petitioners base this argument on this Court's 1986 decision in *Merrell Dow*.

But *Merrell Dow*, and the body of decisional law it has spawned, is inapplicable to the jurisdictional question presented in this case. *Merrell Dow* simply applied the bedrock principle laid down in *Smith* and in *Franchise Tax* – that a state law claim that *necessarily* requires resolution of a *substantial* federal question gives rise to federal jurisdiction – to the particular situation (not presented by this case) in which a plaintiff alleges as a part of a state law claim that the defendant has *violated* a federal standard.

The plaintiffs in *Merrell Dow* filed a state law negligence claim against the maker of the drug Benedictin, which was alleged to cause birth defects, alleging that the manufacturer had violated its duty of care by "misbranding" the drug in

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[3] Perplexingly, and notwithstanding Petitioners' concession that their state law claims incorporate a federal question, Petitioners also argue that the District Court's assertion of jurisdiction was improper because the federal question arises only by virtue of CIRI's federal preemption *defense*. *See, e.g.*, Pet. for Writ of Cert. at 18-19; Pet'rs Supplemental Brief at 5-6. Of course, CIRI never has asserted that its federal preemption defense conferred subject matter jurisdiction, and neither the District Court nor the Court of Appeals so held. *See, e.g.*, Pet. for Writ of Cert. App. A at 6a (District Court order confirming jurisdiction) ("The substantive scope of state law is defined by reference to federal law. The federal question does not arise as a defense; instead, it defines the nature of state law.").

violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"), 21 U.S.C. § 301, *et seq*. This Court concluded that because Congress did not intend that there be a private right of action for:

> misbranding in violation of the FDCA, it would . . . flout, or at least undermine, congressional intent to conclude that the federal courts might nevertheless exercise federal-question jurisdiction and provide remedies for violations of that federal statute solely because the violation of the federal statute is said to be a rebuttable presumption or a proximate cause under state law, rather than a federal action under federal law.

Merrell Dow, 478 U.S. at 812. This Court therefore determined that the lack of a private right of action precluded the district court from exercising federal question jurisdiction.

Merrell Dow itself makes clear that the search for a "private right of action" is necessary only when a plaintiff's state law claim alleges as one of the elements that the defendant has *violated* a federal standard:

> We simply conclude that the congressional determination that there should be no federal remedy for the violation of this federal statute is tantamount to a congressional conclusion that *the presence of a claimed violation of the statute as an element of a state cause of action* is insufficiently "substantial" to confer federal-question jurisdiction.
>
> . . .
>
> We conclude that a *complaint alleging a violation of a federal statute as an element of a state cause of action*, when Congress has determined that there should be no private, federal cause of action for the violation, does not state a claim "arising under the

Constitution, laws, or treaties of the United States."

Id. at 814, 817 (emphasis added) (quoting 28 U.S.C. § 1331).

Petitioners here, however, have not alleged that CIRI *violated* the provision of ANCSA that gives rise to the necessary federal question. To the contrary, Petitioners assert that that provision cannot even be violated. *See* Pet. for Writ of Cert. at 10 ("ANCSA § 7(r) . . . is a purely permissive statute; it is passive, does not command or prohibit any conduct. Therefore it cannot be violated."). The federal question in this case, in contrast to the federal question in *Merrell Dow*, arises by virtue of the fact that the Alaska Corporations Code directs the court to ANCSA, which defines the scope of the Alaska Corporations Code.

Accordingly, as CIRI argued to the Ninth Circuit, the proper method for determining whether the federal question that these Petitioners' claims necessarily present is sufficiently "substantial" is not to look to see whether Congress intended that there be a private right of action under the amendment to ANCSA, but rather to examine the "*nature* of the federal interest at stake." *See Merrell Dow*, 478 U.S. at 814 n.12 (citing academic commentary explaining that apparently inconsistent Supreme Court holdings simply reflect the varying nature of the federal interests at stake in those cases); *see also id.* (observing that this Court has determined whether federal questions were sufficiently substantial to give rise to federal jurisdiction by looking to "the nature of the federal issue"); *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) (finding federal jurisdiction over state law claim to enforce Tribal-State compacts in light of the importance of the "federal interest at stake"); *cf.* American Indian Policy Review Comm'n, Pub. L. No. 93-580, 88 Stat. 1910, *reprinted in* 1974 U.S.C.C.A.N. 2194, 2194 (congressional recognition of "the Federal Government's historical and special legal relationship with American Indian people").

This Court has looked to the nature of the federal interest at stake since as long ago as the 1921 *Smith* decision. *Smith* was a shareholder suit to enjoin a corporation from purchasing bonds issued pursuant to federal statutes that the shareholders contended were unconstitutional. *See Smith*, 255 U.S. at 195. The plaintiffs in *Smith* did not allege that the defendant corporation itself violated any federal statute, and this Court did not analyze whether the federal statutes pursuant to which the bonds had issued gave rise to any private right of action. Rather, this Court looked to the fact that plaintiffs' state law claims "concern[] the constitutional validity of an act of Congress, which is directly called into question," *Smith*, 255 U.S. at 201, and concluded that jurisdiction was proper. *See also Merrell Dow*, 478 U.S. at 814 n.12 (explaining the *Smith* decision as motivated by the importance of the federal question).

Here, the federal interest at stake, ensuring the right of Native Corporations organized pursuant to ANCSA to distribute benefits to elders, is compelling[4] – so compelling that Congress thought it necessary to amend ANCSA expressly to confirm the right. *See* 144 Cong. Rec. S12,589 (daily ed. Oct. 14, 1998) (statement of Sen. Murkowski) ("elder benefits including cash payments . . . represent an important part of the ANCSA corporations"). In light of the importance of this federal interest, the Ninth Circuit correctly determined that Petitioners' "complaint raises a substantial federal question of whether Section 7(r) of ANCSA, 43 U.S.C. § 1606(r), authorizes CIRI to pay dividends to Native leaders who were original CIRI shareholders." *See* Pet. for

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[4] The District Court expressly so concluded. In its preliminary order finding jurisdiction, the District Court discussed the "federal interest" approach to determining whether there is federal jurisdiction over state law claims, and found "[t]his 'interest-based' analysis militates in favor of CIRI. The federal interest in Native American affairs generally and ANCSA-related matters in particular is undeniably paramount." *See* Pet. for Writ of Cert. App. A at 8a.

Writ of Cert. App. D at 28a. Accordingly, under settled law, there is federal subject matter jurisdiction in this case.

B. The Court Of Appeals' Ruling Does Not Implicate Any Circuit Split

As set forth above, because Petitioners do not allege a violation of a federal statute as an element of any of their claims, neither the District Court nor the Court of Appeals was called upon to apply *Merrell Dow's* "private right of action" requirement in determining whether there is subject matter jurisdiction in this case. Nonetheless, Petitioners urge that this Court grant certiorari in order to "resolve the conflict among the circuits by adopting a bright line rule that allows § 1331 jurisdiction only when the federal law at issue both creates a private cause of action under federal law *and* also provides a remedy under federal law." *See* Pet. for Writ of Cert. at 13; *see also* Pet'rs Supplemental Brief at 1 ("Recent decisions in the courts of appeals demonstrate the . . . conflicts among the circuits.").

Petitioners' request is misguided. There is no such "conflict among the circuits," and there is no "circuit split."

Petitioners rely heavily on a student-authored Note in the Harvard Law Review, *see* Note, *Mr.* Smith *Goes to Federal Court: Federal Question Jurisdiction over State Law Claims Post*–Merrell Dow, 115 Harv. L. Rev. 2272 (2002) [hereinafter *Mr.* Smith *Goes to Federal Court*], for the proposition that the circuits are split in their application of *Merrell Dow's* private right of action requirement. *See* Pet. for Writ of Cert. at 11 (citing *Mr.* Smith *Goes to Federal Court* at 2272, 2279-82 & nn. 49-52). That Note concludes:

> [T]he circuits have split nearly evenly, and sometimes within themselves, on the status and scope of *Merrell Dow's* private right of action requirement. The crux of the disagreement is whether the presence of a right of action is the only

> road to *Smith* jurisdiction after *Merrell Dow* or whether *Smith* jurisdiction remains open for state law claims that present federal issues that a federal court should decide. As a result of the nearly even split among the appellate courts, litigants will find it difficult to predict whether a court will take jurisdiction over their *Smith* claims in the absence of a federal cause of action.

Mr. Smith *Goes to Federal Court* at 2281-82 (footnotes omitted).

The cases cited in support of the supposed "split," however, reflect nothing more than the fact that *Merrell Dow's* "private right of action" requirement comes into play only when a plaintiff alleges a state law claim that includes as an element the violation of a federal standard.

Thus, the majority of the cases that the Note author concludes *require* a private right of action involve a state law claim alleging a *violation* of federal standard. The Note cites, at 2282 n.51:

- *Zubi v. AT&T Corp.*, 219 F.3d 220, 223 n.5 (3d Cir. 2000), in which the Third Circuit noted in dicta that *Merrell Dow* had required that there be a private right of action when a state law complaint alleges as an element a violation of a federal statute;
- *Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1212 (9th Cir. 1998), in which the plaintiff alleged that the NASD violated its own (federally authorized) self-regulatory rules;
- *PCS 2000 LP v. Romulus Telecomms. Inc.*, 148 F.3d 32, 35 (1st Cir. 1998), in which the plaintiff had not alleged a violation of any federal standard, but the First Circuit noted in dicta that if the plaintiff had alleged a violation of a particular statute, there still would be no jurisdiction because that statute did not provide a private right of

action; and

- *Sienfeld v. Austen*, 39 F.3d 761, 764 (7th Cir. 1994), in which the plaintiffs in a shareholder derivative action alleged that corporate directors had violated federal antitrust laws.

Others of the cases that the Note concludes, at 2282 n.51, require that the federal statute implicated by a state law claim must provide a private right of action, simply do not so hold:

- *TCG Detroit v. City of Dearborn*, 206 F.3d 618, 622 n.2 (6th Cir. 2000), is a case in which the Sixth Circuit (CIRI believes) misread *Merrell Dow's* private right of action requirement as bearing on whether there is federal jurisdiction even when the plaintiff explicitly alleges a federal claim for violation of a federal statute; and
- *Rogers v. Platt*, 814 F.2d 683, 688 (D.C. Cir. 1987), was not a *Smith* jurisdiction case, but the lead opinion looked to *Merrell Dow* to support the unremarkable proposition that congressional intent should determine whether a federal statute confers federal jurisdiction.

As evidence of the supposed split, the Note also cites certain decisions that the author contends failed to enforce *Merrell Dow's* "private right of action" requirement. Not a single one of those cases, however, represents an instance in which a court found jurisdiction despite a plaintiff's assertion of a state law claim that turned on a violation of a federal statute for which there was no private right of action. The Note cites, at 2282 n.51:

- *Long v. Bando Mfg. of Am., Inc.*, 201 F.3d 754, 759 (6th Cir. 2000), which denied jurisdiction because the federal question in that case, regardless of whether the question related to a federal law that gave rise to a private right of action, was not "necessary";

- *McNeil v. Franke*, 171 F.3d 561, 564 (8th Cir. 1999), in which the Eighth Circuit concluded there was no federal jurisdiction over a quiet title action because the case presented no federal questions;
- *Cabazon Band*, 124 F.3d at 1056, in which the plaintiffs alleged that defendants had violated a Tribal-State Compact, but did not allege that defendants had violated any federal standard;
- *Ormet Corp. v. Ohio Power Co.*, 98 F.3d 799, 806 (4th Cir. 1996), in which the plaintiff sought a declaration that it qualified as an "owner" of certain fossil fuel combustion units within the meaning of the Federal Clean Air Act, but did not allege that the defendant had violated that Act;
- *Virgin Islands Hous. Auth. v. Coastal Gen. Constr. Servs. Corp.*, 27 F.3d 911, 916-17 (3d Cir. 1994), in which the court concluded that there was no federal jurisdiction over an action under the Federal Arbitration Act to confirm or enforce an arbitration award (in which no party appears to have alleged a violation of that Act), even if the underlying dispute might have implicated certain federal regulations; and
- *West 14th St. Comm. Corp. v. 5 W. 14th Owners Corp.*, 815 F.2d 188, 196 (2d Cir. 1987), which held that jurisdiction would exist over a declaratory relief action relating to contracts subject to the federal Condominium and Cooperative Conversion Protection and Abuse Relief Act (but which did allege any violation of that Act), regardless of the presence or absence of a private right of action under the Act, because the Act (like the ANCSA amendment at issue here) defined the boundaries of the parties' contract rights.

Because *Merrell Dow's* specific holding was inapplicable in each of these cases (which the Note describes as not requiring a private right of action), the presence of jurisdiction was appropriately decided based on whether or not the state law claim necessarily required resolution of a

substantial federal question.

Nor do the four recent decisions Petitioners cite in their Supplemental Brief reveal any circuit split implicated by this case:

- *MSOF Corp. v. Exxon Corp.*, 295 F.3d 485 (5th Cir. 2002) (discussed in Pet'rs Supplemental Brief at 2-3), *cert. denied*, 71 U.S.L.W. 3387 (U.S. Dec. 2, 2002), reflects the settled principle that a federal question implicated by a state law claim gives rise to federal jurisdiction only if it is "necessary" to the resolution of the claim. Plaintiffs in that case brought strict liability tort claims alleging violations of state and local regulations, as well as federal regulations, and therefore could have proven their claims without proving any federal violation. *MSOF*, 295 F.3d at 490;
- *Breuer v. Jim's Concrete of Brevard, Inc.*, 292 F.3d 1308, 1308 (11th Cir. 2002) (per curiam) (discussed in Pet'rs Supplemental Brief at 3) involves a "split" in the circuits regarding whether certain language in the Federal Fair Labor Standards Act of 1938 precludes removal – a question entirely unrelated to the jurisdictional question presented here;
- *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 73-74 (2d Cir. 2002) (discussed in Pet'rs Supplemental Brief at 3-4), is not a *Smith* jurisdiction case at all, but mentions *Merrell Dow* simply in the context of clarifying that the "private right of action" requirement is irrelevant to jurisdiction when a plaintiff expressly alleges a federal cause of action for violation of a federal statute; and
- Finally, *Wander v. Kaus*, 304 F.3d 856 (9th Cir. 2002) (amended opinion) (discussed in Pet'rs Supplemental Brief at 4), a case in which plaintiff's state law claim alleged a violation of a federal law for which Congress intended that there be no private right of action, is simply *Merrell Dow* all over again. As the Ninth Circuit noted,

> "Wander's case is materially indistinguishable from *Merrell Dow*." *Wander*, 304 F.3d at 859. The *Wander* case does not, as Petitioners incorrectly suggest, "demonstrate[] the ambiguity within the *Merrell Dow* holding." *See* Pet'rs Supplemental Brief at 4.

In short, there is no "split" on any legal question implicated by this case. *Cf.* Sup. Ct. R. 10(a) (conflict between decisions of Courts of Appeals "on the same important matter" is a consideration in determining whether to grant writ of certiorari); *see also id.* ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."). Rather, the issue decided below was simply whether, under settled law, a particular federal question implicated by a particular state law claim was both "necessary" and "substantial."

VI. THE JURISDICTIONAL QUESTION IN THIS CASE IS UNIQUE AND HAS NO BROAD IMPLICATIONS

Certiorari is inappropriate for other reasons as well.

First, the jurisdictional question is, in the words of the District Court, "somewhat unique." *See* Pet. for Writ of Cert. App. A at 6a. In CIRI's view, that is an understatement. The determination depends on (a) whether a singular feature of the Alaska Corporations Code requires these Petitioners to prove that a particular amendment to ANCSA does not authorize a particular program (which is a question, in the first instance, of state law); and (b) whether determining if ANCSA authorizes elder benefits is sufficiently substantial to justify federal jurisdiction. CIRI is aware of no other pending or threatened cases that pose this sort of jurisdictional question, which will arise only in the rare instance in which a plaintiff sues a Native Corporation for violating a provision of the Alaska Corporations Code that the parties agree is inconsistent with ANCSA.

Accordingly, Petitioners' assertion that "[t]his case is . . . also of great importance to the State of Alaska, to its economy and to its Native peoples," *see* Pet. for Writ of Cert. at 17, is plainly overstated. Also inaccurate is Petitioners' ominous prediction that, absent certiorari in this case, "the internal affairs of Alaska's corporations will no longer be decided by Alaska courts; the Supreme Court of Alaska will no longer be the law giver on matters of corporate law in this State." *See id.* Even if the decision of the Ninth Circuit had precedential value, which it does not, *cf.* Ninth Cir. R. 36-3,[5] the decision's narrow holding rebuts Petitioners' dire predictions. The court held that "the complaint raises a substantial federal question of whether Section 7(r) of ANCSA, 43 U.S.C. § 1606(r), authorizes CIRI to pay dividends to Native leaders who were original CIRI shareholders." *See* Pet. for Writ of Cert. App. D at 28a. Other state law claims against other corporations alleging other wrongs, the proof of which does not depend on what 43 U.S.C. § 1606(r) authorizes, presumably may remain in state court, subject to review by the Supreme Court of

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[5] Ninth Cir. R. 36-3, which expires on December 31, 2002 unless the court votes affirmatively to extend it, establishes that "[u]npublished dispositions and orders of this Court are not binding precedent, except when relevant under doctrines of law of the case, res judicata, and collateral estoppel." If the court does not extend this rule, the former version of Ninth Cir. R. 36-3, which similarly provided that "[a]ny disposition that is not an opinion or an order designated for publication . . . shall not be regarded as precedent," *see* Ninth Cir. R. 36-3 (effective January 1, 1997), will automatically be reinstated. *See* Circuit Advisory Committee Note to Rule 36-3 (July 1, 2000).

Alaska.[6]

There is no reason to grant a writ of certiorari.

VII. CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 12, 2002

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[6] Accordingly, amicus curiae Jimmie D. Hartley, a CIRI shareholder whose only purported interest in this case is the "interest in having shareholder claims adjudicated in his local state court and in having any appeal decided by the Supreme Court of Alaska," *see* Brief For Jimmie D. Hartley As Amicus Curiae In Supp. Of Pet'rs at 2, will not be aggrieved by the denial of certiorari. To the extent Mr. Hartley might have an interest in precluding the District Court for the District of Alaska from properly asserting federal subject matter jurisdiction, that interest plainly is not legitimate.